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Supreme Court, U.S.
FILED
NOV 1 1999
OFFICE OF THE CLERK

No. 98-1161

IN THE

SUPREME COURT OF THE UNITED STATES

THE CITY OF ERIE, PENNSYLVANIA, JOYCE A. SAVOCCHIO, CHRIS E. MARAS, MARIO S. BAGNONI, ROBERT C. BRABENDER, DENISE ROBISON, AND JAMES N. THOMPSON, ALL IN THEIR OFFICIAL CAPACITIES,

PETITIONERS

V.

PAP'S A.M., T/D/B/A "KANDYLAND,"

RESPONDENT

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA

REPLY BRIEF FOR PETITIONERS

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SUMMARY OF ARGUMENT

Respondent Pap's A.M. seeks to minimize the significance of the Pennsylvania court's error by characterizing the opinion in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), as that court did. If the *Barnes* opinion is so fragmented as to defy reduction to a controlling principle, then the Pennsylvania court's disregard of the Supremacy Clause and the principles of *stare decisis* loses some of its impact.

The *Barnes* decision is not, however, so unworkable as Pap's A.M. and the Pennsylvania court represent. The lower courts interpreting *Barnes* have had little difficulty with its basic tenets: (1) nude erotic dance is expressive conduct, and (2) restrictions on nude erotic dance are to be evaluated under the framework set forth in *United States v. O'Brien*, 391 U.S. 367 (1968). The plurality and concurring opinions in *Barnes*, though different, are not irreconcilable.

Pap's A.M.'s belated support for the decision of the Pennsylvania Supreme Court is unpersuasive. Pap's relies heavily on the public remarks of members of Erie's City Council as evidence that the ordinance is impermissibly content-based. These unsworn public expressions of personal support do not constitute irrefutable evidence of improper, illicit legislative motive. The personal reasons motivating a legislator to support an ordinance are not germane to the discussion of its validity.

Despite its protests to the contrary, Pap's A.M. attempts to draw the discussion far away from the only issue properly before the Court. It is not necessary for the resolution of the issue presented to re-litigate *Barnes* or revisit *O'Brien*.

ARGUMENT

I. PAP'S A.M.'S EXTRAJUDICIAL SUPPORT FOR THE DECISION OF THE PENNSYLVANIA SUPREME COURT IS UNPERSUASIVE.

A. Pap's A.M. overstates the difficulty of interpreting and applying *Barnes*.

The *Barnes* opinion is made up of a plurality opinion, two concurrences, and a dissent. Neither concurrence is so distant in its analysis from the plurality or the other concurrence as to render *Barnes* impenetrable.

The plurality and Justice Souter agree that the Indiana statute reviewed in *Barnes* withstands scrutiny under the *O'Brien* test. 501 U.S. at 572 (plurality opinion), 587 (Souter, J., concurring). Justice Scalia's concurring opinion does not reject public order and morality as an appropriate governmental interest unrelated to the suppression of expression. 501 U.S. at 575. Neither does it reject the *O'Brien* analysis where a regulation of conduct incidentally burdens expression. *Id.* at 577. Justice Scalia differs only by finding no burden on expression sufficient to trigger the protection of the First Amendment in the statute then under review. *Id.* at 580.

The *Barnes* opinion has proved nowhere nearly so troublesome to lower courts as, for instance, the opinion in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air ("Delaware Valley I")*, 478 U.S. 546 (1986). Before *Delaware Valley I*, there was a split in the circuit courts over the availability of contingency fee multipliers under federal fee-shifting statutes. *Delaware Valley I* failed to resolve the issue. On rehearing the Court issued a divided opinion, *Pennsylvania*

v. Delaware Valley Citizens' Council for Clean Air ("Delaware Valley II"), 483 U.S. 711 (1987). That opinion again split the circuits. *See*, Kyle R. Kravitz, Note, *Denying the Devil His Due: Contingency Fee Multipliers After City of Burlington v. Dague*, 38 VILL. L. REV. 1661 (1993).

In the Third Circuit alone, the *Delaware Valley II* opinion sent the same case from the Court of Appeals back to the District Court, and back again to the Court of Appeals with acerbic commentary from the District Court. *Blum v. Witco Chemical Corporation ("Blum II")*, 888 F.2d 975 (3d Cir. 1989). The debate over the availability of contingency fee multipliers was finally put to rest by a third opinion of this Court, *City of Burlington v. Dague*, 505 U.S. 557 (1992).

Similar difficulties plagued the opinion in *Baldasar v. United States*, 446 U.S. 222 (1980). *See*, Kerry R. Northrup, Note, *Nichols v. United States: Using Prior, Uncounseled Misdemeanor Convictions to Enhance Sentences - A Dispute Resolved*, 40 VILL. L. REV. 475 (1995). There is far less confusion among the lower courts in the application of *Barnes*. Some attempts at *Barnes*-style ordinances have not survived scrutiny. The level of scrutiny and the analysis employed, however, have been consistent. The Pennsylvania Supreme Court stands alone in its rejection of *Barnes* as a case devoid of precedential reasoning.

Pap's A.M. cannot downplay the significance of the Pennsylvania court's disregard of the result in *Barnes*. Lower courts interpreting federal law are unavoidably bound by the "result *stare decisis*" doctrine "mandat[ing] that any specific result espoused by a clear majority of the Court should be controlling in substantially identical cases." Linda Novak, Note, *The Precedential Value of Supreme Court Plurality Decisions*,

80 COLUM. L. REV. 756, 779 (1980). Because Erie's ordinance is substantially indistinguishable from the statute in *Barnes*, the Pennsylvania court was constrained to uphold it.

B. Pap's A.M.'s attempts to distinguish Ordinance 75-1994 from the statute in *Barnes* are unconvincing.

The various arguments advanced by Pap's A.M. to distinguish Erie's ordinance from the statute in *Barnes* state and restate the proposition that Erie's ordinance is content-based and narrowly targeted only at nude erotic dancing. The arguments focus on one phrase in the preamble. [Respondent's Brief at 8].

Excluded from Respondent's argument are two more prominent statements of intention. The preamble also states

> Council is fully aware of and fully respects the fundamental constitutional guarantees of free speech and free expression and realizes that restrictions of such freedoms must be carefully drafted and enforced so that speech and expression are not curtailed beyond the point at which it is essential to further the City's interest in public health, safety and welfare.

[Pet. App. A at 7a]. In addition, the ordinance at Section 1, paragraph 6 provides

> CONSTRUCTION AND SEVERABILITY - It is the intention of the City of Erie that the provisions of this ordinance be construed, enforced and interpreted in such a manner as will

> cause the least possible infringement of the constitutional rights of free speech, free expression, due process, equal protection or other fundamental rights consistent with the purposes of this ordinance.

[Pet. App. A at 9a].

The Court of Appeals for the Ninth Circuit has adopted a useful analysis for evaluation of enactments burdening speech. The circuit court examines the full record for objective indications of intent set out in *City of Las Vegas v. Foley*, 747 F.2d 1294 (1984). The factors considered include the face of the statute, the effect of the statute, comparison to prior law, facts surrounding the enactment, the stated purpose, and the record of the proceedings. *Colacurcio v. City of Kent*, 163 F.3d 545 (9th Cir. 1998), quoting *Las Vegas v. Foley*.

Erie's public indecency ordinance, on its face and in its effect, is intended to replace provisions more than a century old with "new language consistent with current state and federal law." The ordinance is explicitly tied to the concept of public indecency embodied in the Indiana statute reviewed in *Barnes*. [Pet. App. A at 7a].

The circuit court in *Colacurcio* reviewed the subjective views of the legislators for "objective manifestations of an illicit purpose." 163 F.3d at 552. Absent such indicia as extraordinary procedural measures, procedural lapses, or hasty changes in City policy, the *Colacurcio* court did not find illicit purpose. *Id.* In *D.G. Restaurant Corporation v. City of Myrtle Beach*, 953 F.2d 140 (1991), the Court of Appeals for the Fourth Circuit recognized that Myrtle Beach enacted its ordinance in response to D.G. Restaurant's application for a

building permit. D.G. Restaurant's plan was treated by the circuit court simply as a triggering event. The court there found no improper motivation. *Id.* at 146.

The Ninth Circuit has adopted a predominant intent standard, following *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). The circuit court acknowledged the difficulty in distinguishing between a motivating factor which does not invalidate an ordinance and predominant intent, which does. *Colacurcio* at 551. The Court of Appeals for the Eleventh Circuit has observed that reference to content is not equivalent to suppression of content. *Sammy's of Mobile, Ltd. v. City of Mobile*, 140 F.3d 993 (1998).

Respondent would establish intent to suppress only one form of expression by emphasizing one phrase in the ordinance and isolated statements of Council members. The ordinance taken as a whole does not evidence illicit legislative motive. Nor do the unsworn public statements of the Council members supporting the ordinance show a predominant intent to suppress expression. The record as a whole clearly shows paramount concern for the protection of free expression. Only incidental encroachment on expression, where such encroachment is essential to promote the public health, safety and welfare, is tolerated under Erie's public indecency ordinance.

II. RESPONDENT'S OPTIONAL QUESTION PRESENTED IS NEITHER SET OUT IN NOR FAIRLY INCLUDED IN THE QUESTION PRESENTED.

This Court's Rule 14.1(a) states the scope of the issues before the Court in this matter. The Court will consider only

questions set out in the petition for certiorari or fairly included therein. An issue is fairly included in the question presented "when the issue must be resolved in order to answer the question." *Missouri v. Jenkins*, 515 U.S. 70, 145 (1995) (Souter, J., dissenting)(citations omitted).

Respondent's Optional Question Presented is tangential to the only question raised by the petition for certiorari but entirely unnecessary for the disposition of the question. An affirmative response to Pap's A.M.'s question would undo both *Barnes* and *O'Brien*. The City has not raised any question requiring relitigation of *Barnes*. The City's question takes the *Barnes* decision as a settled statement of law and asks only whether the Pennsylvania court was required to do the same.

Rule 14.1(a) does not limit the Court's power to decide questions not raised by the parties. *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971). But where an issue has not been raised by the petitioner and is not necessary to the disposition of the petitioner's issue, the rule raises a strong presumption against consideration of a question newly raised after certiorari has been granted. *Yee v. City of Escondido, California*, 505 U.S. 519 (1992). In a different case the various First Amendment issues raised by Pap's A.M. could stand side-by-side with the issue raised by the City. *See Yee* at 537 (both questions could be subsidiary to a third question, but neither is encompassed by the other). This case is not, however, the "most exceptional case" warranting a departure from Rule 14.1(a). *Izumi Seimitsu v. U.S. Philips Corp.*, 510 U. S. 29, 32 (1993) (citations omitted).

Respondent Pap's A.M. candidly admits that its Optional Question Presented is extraneous to the City of Erie's issue, and purportedly agrees that its First Amendment arguments are not

properly before the Court. [Respondent's Brief at 15-16]. Respondent then cites to *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994), which in turn quotes *Dayton Board of Education v. Brinkman*, 433 U.S. 406 (1977), for the proposition that a prevailing party may make new arguments in support of the judgment below. The arguments made here by Pap's A.M., however, go well beyond the argument allowed by the Court in *Lebron v. National Railroad Passenger Corporation*, 513 U.S. 374 (1995). In *Lebron*, the resolution of the disputed issue was a prerequisite for the resolution of the question raised by the petition for certiorari. Respondent Pap's A.M. here presents a distinct and unrelated question.

Neither does Pap's A.M. present an issue "not pressed or passed upon." Pap's alternate argument, that Erie's ordinance is fatally overbroad, was raised before the Pennsylvania Supreme Court. The Pennsylvania court granted review of the issue [Pet. App. E at 69a] but did not decide it. The Court in *Illinois v. Gates*, 462 U.S. 213 (1983), noted particular concerns with addressing a question not decided by the state's highest court in a case originating in the state courts. There is some question as to whether the Court's certiorari jurisdiction under 28 U.S.C.S. § 1257 encompasses a question not decided by the state court. *Gates* at 219 (citations omitted).

The *Gates* Court also cited compelling prudential considerations underlying the "not pressed or passed on below" rule. 462 U.S. at 224. The First Amendment issues Pap's A.M. raises by its Optional Question Presented are difficult and important, just as the exclusionary rule issue in *Gates* was. Scrupulous adherence to customary limits on the Court's discretion will serve in this case, as it did in *Gates*, to promote respect for the adjudicatory process and the stability of the Court's decisions. *Id.*, quoting *Mapp v. Ohio*, 367 U.S. 643 (1961).

CONCLUSION

The debate which brought the parties here to this Honorable Court will likely continue after the decision in this case is handed down. Freedom of speech and expression are fundamental to this nation's identity. There will always be those who resist any slight restriction on expression, fearing the proverbial "slippery slope." There will always be those who would seek to suppress a disfavored message.

The City of Erie's public indecency ordinance places no impermissible restriction on expression. The ordinance reflects this Court's determination that conduct, even when engaged in for expressive purposes, can be regulated. Where the regulation is sufficiently justified by an interest unrelated to the suppresion of expression, the incidental burden on expression can be tolerated. The Indiana public indecency statute in *Barnes* did not impermissibly restrict expression. Neither does the ordinance under review here. The decision of the Pennsylvania court must be reversed.

Respectfully submitted,

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